Supreme Court, U.S.
FILED

No. 03 893 DEC 15 2003

In the

Supreme Court of the United States

CALVIN G. LATNER,

Petitioner,

versus

DELTA-HA, INC.,
HA-INTERNATIONAL, LLC.

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

Raymond J. Hafsten, Jr.
Counsel of Record
Suite 1319, 55 Monument Circle
Indianapolis, Indiana 46204
317-635-2244

Attorney for Petitioner

QUESTIONS PRESENTED

1. At the summary judgment stage under the Age Discrimination in Employment Act ("ADEA"), if the plaintiff has evidence from which a jury may conclude that the employer's decision-maker lied about some of the asserted subjective reasons for its failure to rehire, can the district court conclude that the employer is entitled to summary judgment on the grounds that the employer had an honest belief in the asserted, subjective reasons?

2. Under the ADEA what are the limits of the inferential use by a jury of a material falsehood by the employer's decision-maker?

A/ Does *Falsus in uno falsus in omnibus* apply to actions brought under the ADEA? *Santissima Trinidad and St. An De,* 20 U.S. 283 (1822)?

B/ If the subjective, specific reasons for the adverse employment action are mendacious, does that permit a jury to infer that a subjective, generalized reason is mendacious and thus properly conclude discriminatory intent?

3. Did the district court err when it considered for purposes of a summary judgment analysis that the respondents were essentially a single defendant?

PARTIES TO THE PROCEEDING

Petitioner

Calvin G. Latner is an individual citizen of the United States residing in the Southern District of Indiana. He has no corporate affiliations. He was the plaintiff in an age discrimination action in the district court and the appellant in the court of appeals.

Respondents

Delta-HA, Inc. is a privately held corporation owned by Huettenes-Albertus, a German company whose address is Wiesensprabe 23/64, 40549 Dusseldorf, Germany. HA-International, LLC is a limited liability company 60% owned by Borden Chemical, Inc. and 40% by Huettenes-Albertus. Both of these business entities were defendants in the district court and appellees in the court of appeals. Petitioner believes that neither of the respondents is publicly traded nor is Huettenes-Albertus publicly traded. Petitioner has no knowledge about Borden Chemical, Inc., which owns 60% of respondent HA-International, LLC.

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PETITION FOR WRIT OF CERTIORARI

Calvin Latner, the Petitioner, respectfully suggests that a writ of certiorari issue to review the unpublished opinion and order denying rehearing ***en banc*** of the United States Court of Appeals for the Seventh Circuit entered this on July 7,2003 and August 6,2003, respectively, which affirmed the district court's summary judgment for the respondents.

OPINIONS BELOW

The opinion of the District Court (App.6a) is unreported. The unpublished order of the Seventh Circuit of Appeals on the merits (App. 2a-6a, which is the subject of this review. The order of the Seventh Circuit denying the petition for panel rehearing and suggestion ***en banc***.(App.1a-2a) is unreported.

STATEMENT OF JURISDICTION

The opinion of the Seventh Circuit Court of Appeals was entered on July 7, 2003. The Court of Appeals entered an order denying a timely petition for rehearing *en banc* on August 6, 2003. A timely filed extension of time to file a petition for certiorari was tendered to the Seventh Circuit Justice, John Paul Stevens. An extension was granted to December 13, 2003, a Saturday.

The jurisdiction is invoked pursuant to 28 U.S.C. §. 1254(1).

STATUTORY AND RULE PROVISIONS

Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. §. 621 *et seq.*

Federal Rule of Civil Procedure 56

STATEMENT OF THE CASE

Calvin Latner was denied his "day in court" and his 7th Amendment right to a jury trial because the district court applied the Seventh Circuit's unique "honest belief' rule(citing, *inter alia, Wade v. Lerner New York, Inc.*, 243 F.3d 319, 323 (7th Cir. 2001) to his ADEA action. The application of this unique rule was affirmed by the court of appeals citing, *inter alia, Franzoni v. Hartmarx Corp.*, 300 F.3d 767, 772 (7th Cir. 2002). Latner's proof path was *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802 (1973). The district court and the court of appeals usurped the 7th Amendment by determining credibility and discarding material evidence from which a jury could find decision-maker mendacity on some of the reasons, and, therefore, infer *falsus in uno falsus in omnibus.* The asserted material evidence by the respondents' decision-maker, Smith, and by Latner and his witnesses was testimonial. The decision-maker's reason for the failure to rehire Latner was his subjective belief "not aggressive enough for sales" C.A.Op.3a and "not as good as" the younger Stransky belief C.A.Op.6a. Smith's beliefs were based only upon his personal observations.

Decision-maker Smith lied about some of his personal observations of Latner. These observations were the decision-maker's specific reasons for negating Latner during selection process when all former salesmen of Delta-HA were rehired by HA-International. Smith testified that he personally observed Latner in sales or technical service calls on the property of two specific customers and such observations were why he believed Latner was not "aggressive enough for sales." Managers and executives of these customers testified that Smith was never there to so observe Latner in the performance of his

job.[1], *infra,* p.5-7. Smith also lied about his observation of Stransky in a sales position while Ashland Chemical employed them both prior to their employment by the respondents because Smith was gone when Stransky was in sales at Ashland. *Infra,*p.7.

"Latner worked for Delta-HA, Inc., and its predecessors in various capacities over a period of about seven years, working most recently as a regional sales, manager. In April 2001, Delta-HA merged with another company to form HA-International, LLC. ("HAI"). During the merger, Delta-HA terminated Latner's employment and HAI did not rehire him. Latner contends that this adverse action was the result of age discrimination. Defendant Delta-HA contends that it terminated Latner because it terminated all sales positions. Defendant HAI contends that it did not rehire Latner because he was less qualified for the sales position than another candidate." D.C.Order. App.7a. Latner was the only Delta-HA salesman not rehired by HAI, post merger. Rec. App.55.

The district court found that Latner established a prima facie case of age discrimination. D.C.Order. App.6a-7a. But the district court concluded that he did not produce evidence that would permit a reasonable jury to conclude that defendants' stated reasons for not rehiring Latner after the merger were pretexts for age discrimination. D.C.Order. 15a. "A stated reason for a termination decision is not factually baseless, however, simply because it might be partly wrong as a factual matter. The relevant pretext inquiry is whether the decision-maker honestly believed the

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[1] Respondents never asserted any independent, non-performance reasons, such as drug use, late to work, theft of company property, or insubordination as additional non-discriminatory reasons for their adverse employment action.

asserted facts underlying the termination decision." D.C. Order. 20a.

The unpublished order of the Court of Appeals echoed the district court's "honest belief" rationale:[2] C.A. Op. 5a.

> "To establish pretext, an employee must show that his employer did not ***honestly believe*** the reason it gave for not hiring him. *Franzoni v. Hartmarx Corp.*, 300 F.3d 767, 772 (7th Cir. 2002). Latner attempted to challenge HA-International's explanation for not hiring him through his own affidavit, in which he stated that vice president Smith never saw him interact with customers and therefore, lacked any basis to assess his skills. But Latner's affidavit states only that Smith never joined him during "technical sales calls." It does not contradict Smith's claims that he ***could*** assess Latner's skills by observing him during other types of sales meetings and situations." (emphasis added)

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[2] The court of appeals questioned Latner's *prima facie* case against HA-International. The district court found that it was established, and the issue was not raised by HA-International on appeal. It was established because all of Delta's salesmen were rehired by HA-International except Latner, and Latner's territory was assumed by a substantially younger person. D.C.Order.13a-14a. The panel acknowledged that Latner was a good employee. C.A.Op.6a. Latner was otherwise qualified for the position. The panel misconstrued Latner's argument by limiting it to respondent Delta-HA ("Latner identifies all of Delta's other former salespersons as similarly situated employees who were treated more favorably, but it is undisputed that they were all terminated along with Latner" C.A.Op.4a-5a). It was directed at respondent HA-International where all of Delta's salesmen save Latner were rehired and the younger salesman replaced Latner. Rec.App.55.

Smith asserted a non-specific, generalized reason that Latner was not as good as the younger Stransky. The basis for that exclusively subjective reason was Smith's generalized, non-particularized testimony that he personally observed them in the field. It was Smith's false testimony (which was discarded) regarding specific observations of Latner and a specific observation of Stransky that were mendacious because Latner's evidence demonstrated that Smith was not present to so observe Latner and Stransky when Smith said he was..., *infra,* p. 6,7.

> "The remaining evidence Latner offered on the issue of pretext-affidavits from former customers attesting to his proficient knowledge of resins and coatings, and the deposition testimony of supervisors detailing his procurement of a major new account-established only that he was a good employee, not that HA-International did not ***honestly believe*** that Latner was not as good as the other salespersons it hired. *Franzoni,* 300 F. 3d at 772" (emphasis added) C.A.Op.6a.

Both the district court and the court of appeals discarded material evidence by determining credibility and weight, which would allow a jury to find that the decision-maker Smith lied about some of the specific reasons for his belief that the younger Stransky was better than Latner.

Smith testified:

Q. Did he(Latner)have a significant impact upon Delta-HA obtaining the Navistar business?

A. No (Record Appdx. P.44

Navistar testified:

Cal Latner was not just a maintenance man at Navistar he was an experienced technical

salesman. If he would not have been on our site during the Bio-Diesel testing and conversion it is doubtful that the product would have installed when it was...(Record Appdx. p. 14(b)

Smith testified:

A. I observed him(Latner) in the field. I was with him. I spent a lot of time in the field with the guys.

Q. How many times would you have spent with Cal Latner in the field?

A. I don't recall how many times.

Q. ...would it be more than once or twice a year?

A. ...absolutely.

Q. And that is, you would be with him(Latner) calling on his customers.

A. Uh-huh.

Q. five or six times a year?

A. Probably.

Q. ..it is from your personal observation that you felt he(Latner) was not aggressive enough for sales, is that it?

A. Uh-huh. (Record Appdx. p. 46)

Smith testified:

Q. How many times in..2000 did you find yourself with Cal Latner in a technical **or** sales situation at a customer of Delta-HA?

A. I would say approximately five times.

Q. And those would be the three majors, Golden, Chrysler and Navistar?

A. **Yes**

Q. In the year 2001...the year of merger...?

A. Once or twice.

Q. And the year 1999...how many times?

A. Five or six times.(Record Appdx.p.

Baker of Navistar testified:

"Smith **never personally observed** Cal Latner on site at our facility...in sales **or** technical service calls

ever. Because it was my job at Navistar to be where Cal Latner was and what he was doing and I never saw Richard Smith personally observed[sic] Cal Latner or for that matter on site in my presence when Cal was not present in a sales **or** technical service capacity." Record Appdx.p.14(b)(emphasis added)

Critzer of Golden Casting testified:

"Golden changed from a competitor of Delta-HA to Delta because of the efforts...Cal Latner....before our acceptance of and change over to Delta...**I never observed Smith**, President of Delta-HA accompanying Cal Latner on any sales call with us, on a testing call with us, or conducting any testing or technical advisories to us with Cal Latner." (Record Appdx. p.17)(emphasis added)

Smith testified:

Q. How long did he(Stransky) work in sales under you when you were at Ashland?

A. Maybe a year. Prior to that he was in tech service.

Q. Did you have an opportunity to observe his performance (Stransky) as a salesperson when he was with you at Ashland..

A. Yes, I did.

Stransky testified:(questioning by defense counsel)

Q. ..when you first became a salesperson for Ashland ...what 1988 or 1999?

A. Yes

Q. And Rick Smith was still there at the time at Ashland. Do you remember when he left?

A. **I don't believe he was there at that time.**

Q. Do you remember when he left?

A. I don't remember the exact day. I know I worked for him in service and then I believe it was sometime during that first year that he moved on.(Record Appdx.p.74 p.53)

Latner's evidence that Smith was never there to personally observe...when Smith said he was and those specific observations were bases for his belief in the relative superiority of Stransky over Latner...is of the same probative quality that this Court has said was a "deliberate falsehood" which "Courts of justice under such circumstances are bound upon principles of law and morality and justice, to apply the maxim *falsus in uno falsus in omnibus." Santissima Trinidad and St. An De,* 20 U.S. p.339. ("(W)here the party speaks to a fact...which he cannot be presumed liable to mistake, as in ...the country of his birth, or his being in a vessel on a particular voyage, (e.g. observing Latner in sales at Navistar) or living in a particular place(e.g. at Ashland Chemical when Stransky was in sales), if the fact turn otherwise, it is extremely difficult to exempt him from the charge of a deliberate falsehood..."). The maxim is particularly applicable to oral recollective evidence. *Telephone Cases,* 126 U.S. 1 (1888) ("but it means that justice will not rest on testimony a substantial part of which is proved to be false. How much more so in a case which depends on mere oral recollections...")

REASONS FOR GRANTING THE WRIT

1/ Seventh Circuit's Unique[3] Honest Belief Blocks the Well Traveled Path from *McDonnell Douglas to Reeves* to the Jury and Conflicts With the Sixth Circuit

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[3] To the best of his ability, counsel has searched the Lexis data base and found only the Seventh Circuit following its honest belief rule. The Sixth Circuit, *infra,* p.11 is the only other Circuit to have a rule called "honest belief" but it is reasoned based on particularized facts and the Sixth suggests that the Seventh Circuit's is mythologically based.

The Seventh Circuit's mature "honest belief' rule, as applied in a Rule 56 context, is unique to all circuit courts. See *Jennings v. Mid-American Energy Co.*, 282 F.Supp. 954, 962 (D.C. S.D. IA. 2003). The employer need only provide an honest reason for its adverse action, even if that reason has no factual support...was ill informed...was ill-considered then there is no pretext. See *Pollard v. Rea Magnet Wire Co.*, 824 F.2d 557, 559(7th Cir. 1987) D.C.Order. 20a. The "honest belief' rule of the Seventh Circuit has marginalized the pretext proof path of *Reeves v. Sanderson Plumbing Prod., Inc.*, 530 U.S. 133 (2000). "Not much imagination is required to see how the Seventh Circuit's rule could operate as another method of discounting a plaintiff's pretext evidence. In *Alexander v. Wisconsin Dept. of Health*, {263 F.3d 673 (7th Cir. 2001)} the panel upheld summary judgment notwithstanding factual disputes because the decision maker had a "legitimate belief that such discipline was justified." Thompson, Charles F., *Juries Will Decide More Discrimination Cases: An Examination of Reeves v. Sanderson Plumbing Products, Inc.*, 26 Vt. L. Rev.1,41-42 (2001). The Seventh Circuit's "honest belief" has made it virtually impossible for a plaintiff to prevail on an employer's motion for summary judgment absent direct evidence of the employer's discriminatory intent. "Requiring plaintiffs to prove their employer's state of mind...whether the beliefs are honestly held, amounts to a requirement that the plaintiff present direct evidence of discriminatory purpose. The honest belief standard becomes more problematic when applied to subjective"...reasons. Lawton, Anne, *The Meritocracy Myth and the Illusion of Equal Employment Opportunity*, 85 Minn.L. Rev.587,646-651 (2000).

In affirming "honest belief" in a Rule 56 context based on "foolish or trivial or even baseless" reasons [as stated in *Johnson v. Nordstrom, Inc.*, 260 F.3d 727, 733 (7th Cir. 2001)(citations omitted; see also D.C. Order 16a)], the employee is denied this Court's evidentiary path well-traveled from *McDonnell Douglas* to *Reeves* to the jury.

A fool is foolish; however, being foolish or baseless is never a deliberate falsehood. It is an "honest belief" in the Seventh Circuit. Thus any testimonial reason, even foolish or baseless, not specifically rebutted as a falsehood will require summary judgment for the employer; notwithstanding a finding of material mendacity. *Partee v. Buch*, U.S.App. Lexis 33190, at 14(7th Cir. 1997) ("as long as there is one legitimate reason the defendant will succeed on summary judgment."). Honest belief used in this manner denies the 7th Amendment. *Reeves,* supra, (it is permissible...to infer the ultimate fact of discrimination from falsity of the employer's explanation..., 530 U.S. p.147)

The panel concluded that Latner's evidence "does not contradict Smith's claims that he ***could*** assess Latner's skills by observing him during other types of sales meetings and situations."(emphasis added). But Latner's evidence established that a jury could conclude that Smith was lying about his specific observations of Latner at a specified number of times at particular customers and was lying about a year's worth of sales observations of the younger Stransky. Smith was never there to observe either Latner or Stransky at these specified times and places. Smith's generalized testimony about non-specific meetings(as to time, place, and who) was the basis for the panel's application of the rule. See C.A.Op.5a. Latner, however, denied such observations.[4] The district court and the panel discarded Latner's evidence of specific mendacity with a credibility and weight conclusion. Because Smith "**could**" assess Latner during other types of situations." The remaining evidence... only that he was a good employee, not that HA-International did not ***honestly believe*** that Latner was not as good as the other salespersons." (emphasis

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[4] The panel misconstrued and parsed Latner's evidence...the affidavit "states only that Smith never joined him during 'technical sales calls." C.A.Op.5a. Latner said *inter alia* "Richard Smith never, made a technical sales call **or** service call with me...in my central Indiana territory." Rec. App.p.95

added). If a jury could find material mendacity how can a decision-maker hold an honest belief in a summary judgment context?

> "Taking decision making authority from juries runs counter to basic and long-cherished principles of our system. One primary function of the jury has been to make commonsense determinations about human behavior, reasonableness, and the state of mind...paradigm being the reasonable person." Miller, Arthur, *The Pretrial Rush to Judgment: Are The "Litigation Explosion," "Liability Crisis," and Efficiency Cliches Eroding Our Day in Court and Jury Trial Commitments?*, 78 NYU L. Rev. 982, 1134(2003)

The district court was Latner's "jury" and the panel affirmed that "jury's" judgment for the respondents. Honest belief shielded the employer from the jury and liability. *Jennings*, 282 F.Supp.P. 963.

In *Smith v. Chrysler Corp.*, 155 F.3d 799, 806 (6th Cir. 1998), the Sixth Circuit specifically rejected the Seventh's "honest belief' standard. The "honest belief' rule credits an employer's belief without requiring that it be reasonably based on particularized facts rather then on ignorance and mythology, we reject its approach." "When the employee is able to produce sufficient evidence to establish that the employer failed to make a reasonably informed and considered decision before taking its adverse...action, thereby making its decisional process 'unworthy of credence' then any reliance placed by the employer in such process cannot be said to be honestly held." 155 F.3d pp.807-08

When invited to revisit "honest belief' with the Sixth Circuit's rule of "reasonably informed"..."particularized

facts" as an exemplar, the Seventh Circuit refused. *Flores v. Preferred Technical Group,* 182 F.3d 512, 516 (7th Cir. 1999).

The Sixth Circuit's rule of reason and specific facts follows this Court's use in *Reeves,* 530 U.S.p.148, of the "legitimate reasons" and an assumption that "employers act with some reason" rationales as stated in *Furnco Constr. Corp. v. Waters,* 438 U.S. 567, 577 (1978). In a Rule 56 context, the Seventh Circuit honest belief rule requires summary judgment for the unreasonable and foolish or generalized articulations of employers; notwithstanding, the employee has demonstrated that the employer's decision-maker lied about his specific and particularized assertions. The district court's conclusion and the panel's affirmation that Smith **could** assess Latner's skills from his asserted generalized, non-specific situations...was a determination of testimonial credibility not required to be believed by a jury because Smith's credibility was "in play" because a jury could conclude he was mendacious about specific observations which were the basis for Smith's belief that Latner was "not as good as" Stransky .

2. Under the ADEA what are the limits for inferential use by a jury of a material falsehood by the employer's decision-maker? Does *Falsus in uno falsus in omnibus* apply to actions brought under the ADEA?

The evidentiary sufficiency analysis in an ADEA case at the summary judgment stage follows the same analysis as the ultimate question of fact as in all civil cases. *St. Mary's Honor Center v. Hicks,* 509 U.S. p.524. The court "must disregard all evidence favorable to the moving party that the jury is not required to believe...the court should give credence only to that evidence of the moving party that is from disinterested witnesses that is uncontradicted and unimpeached. *Reeves,* 530 U.S. p.151(citing Wright & Miller 299). "A jury is entitled to treat a party's dishonesty about a

material as evidence of culpability" *Reeves,* Id.p.154 (Ginsburg concurring). "The jury's strengths in evaluating demeanor, sensing the 'mainsprings of human conduct,'(*Markman v. Westview Instruments, Inc.,* 517 U.S. 370, 389 (1996)] and reflecting community standards, must be respected..." Miller, *The Pretrial Rush to Judgment,* p.1093 Since a jury is not required to believe a mendacious party can the "honest belief" rule require summary judgment for the employer? Only if *falsus in uno...* does not apply to an ADEA action during a Rule 56 determination.

The Tenth Circuit in *Tyler v. RE/Max Mountain States, Inc.,* 232 F.3d 808 (10th Cir. 2000) sustained a plaintiff's verdict where the plaintiff only cast doubt on less than all of the reasons and used the common sense rationale of *falsus in uno falsus in omnibus...* "if a person is shown to be a liar in an outrageous manner or is shown to have lied about a number of issues, the inference that the person is non-credible, and should not be believed as to other issues, is a reasonable one" p.814. If Latner's evidence is to be believed as it must in a Rule 56 context, and since it has the quality of a "deliberate falsehood" (*Santissima,* supra, ...was never there), a reasonable inference is that Smith's other testimony is not credible and the *Reeves* inference of culpability may appear to a reasonable jury.

The district court(App.18a-19a) and the court of appeals(App.5a) disregarded ageist circumstantial evidence of Alex Otte because Smith said he was the exclusive decision-maker. Latner's evidence was testimonial evidence from Smith and Otte that they routinely met to discuss Latner and other salesmen. However, if an ADEA jury is entitled to use the *falsus* maxim under the circumstances of the Rule 56 record in this case then it may infer that Smith was also mendacious about Otte's non-participation in Latner's adverse employment action. Thus rendering Otte's ageist statements probative circumstantial evidence and not disconnected strays from the Seventh Circuit's honest belief

rule. A court may not discard circumstantial evidence of discrimination on the grounds that the evidence, in its opinion is insufficiently related to the discharge decision.

No matter the cause of action, if it's touched by the 7th Amendment, a jury determines the ultimate question of fact. If ADEA cases are to be treated no better or no worse than other civil cases where material, subjective, testimony is subject to mendacity determinations and inferences flowing therefrom, honest belief cannot be used at the summary judgment stage to determine credibility and weight. If so...the path from *McDonnell Douglas* to *Reeves* to trial is blocked and the only way around is direct evidence.

Departing from longstanding principles of common law jury trials to determine mendacity and its inferences discriminates against the ADEA. *Lytle v. Household Mfg., Inc.*, 494 U.S. 545 (1990)(...concern about judicial economy, to the extent that it supports respondent's position, remains an insufficient basis for departing from our longstanding commitment to preserving a litigant's right to a jury trial." P. 553-554. This Court's admonition in *Lytle*, Id.p.554-555 that courts must draw all reasonable inferences in favor of the non-moving party and it may not make credibility determinations or weigh evidence must mean and be more than an introductory mantra to summary judgment opinions.

As Professor Miller observed the use of summary judgment has in some contexts become "Pavolvian" suggesting that age discrimination actions are in that context. Miller, *The Pretrial Rush to Judgment,* supra, p.1053-54. Has its use has become a docket control device? Miller suggests it that it has ... "On occasion, federal courts have acknowledged openly the role docket concerns have played in their use of summary judgment." Id.p.1056(citations omitted) Miller's paradigm is *Shager v.*

Upjohn Co., 913 F.2d 398, 391 (7th Cir. 1990) ("...that is due to docket pressures in general...makes appellate courts reluctant to reverse a grant of summary judgment merely because a rational factfinder could return a verdict for the non-moving party...". Id.

CONCLUSION

Petitioner Latner ought to have his day in court with the 7th Amendment. The interpretation of mendacity in an Age discrimination case follows the same well-worn path that any civil case travels. In a Rule 56 determination, the honest belief rule of the Seventh Circuit, which has matured for over 15 years, is alone amongst the Circuits and while criticized by the Sixth Circuit for being mythological, the Seventh remains steadfast. If Cal Latner's age discrimination evidence is to be analyzed under the same rules as all other jury cases, then if a jury can find that the decision-maker lied about some material matters constituting or making up the reason or reasons for the adverse employment action, there can be no "honest belief at the summary judgment stage.

Petitioner, Calvin G. Latner, respectfully requests that his petition for writ of certiorari be granted.

Respectfully submitted,

RAYMOND J. HAFSTEN, JR.
Counsel of Record
55 Monument Circle #1319
Indianapolis, IN 46204

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 02-3813

[Filed August 6, 2003]

CALVIN G. LATNER
Plaintiff-Appellant,
v.
DELTA-HA, INC.,
HA-INTERNATIONAL, LLC
Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Indiana
Indianapolis Division
No. IP01-0993-C-H/K
Hon. David F. Hamilton, Judge

JUDGES:
Before Hon. Kanne, Circuit Judge, Hon. Diane P. Wood, Circuit Judge, Hon. Ann Claire Williams, Circuit Judge

ORDER

Upon consideration of the Plaintiff-Appellant's petition for rehearing *en banc*, file on July 7, 2003, no judge in active service has requested a vote thereon and the judges on the original panel have voted to deny the petition. Accordingly,

IT IS ORDERED that the petition for rehearing *en banc* is hereby DENIED.

Judge Ripple did not participate in the vote.

UNPUBLISHED ORDER
Not to be cited per Circuit Rule 53

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois

Argued June 10, 2003
Decided July 7, 2003

Before
Hon. MICHAEL S. KANNE, Circuit Judge
Hon. DIANE P. WOOD, Circuit Judge
Hon. ANN CLAIRE WILLIAMS, Circuit Judge

No. 02-3813
Appeal from the United States District Court
Southern District of Indiana
Indianapolis Division

CALVIN G. LATNER,
Plaintiff-Appellant,

No. IP 01-993-C-H/K

v.

DELTA-HA, INC., and HA-INTERNATIONAL, LLC,
Defendants-Appellants.

Hon. David F. Hamilton, Judge

ORDER

In 2001 defendant Delta-HA, Inc. created a joint venture-HA-International, LLC-with one of its competitors. The joint venture sold coatings and resins, products used by manufacturers who cast molten metals. After creating the joint venture, Delta stopped selling coatings and resins itself,

and terminated its entire sales force including 59-year-old Calvin Latner. Although most of the sales force was subsequently hired by the joint venture, Latner was not. Latner says he was terminated by Delta and not rehired by the joint venture because of his age, and sued under the Age Discrimination in Employment Act of 1967, 29 U.S.C. sec 621 *et seq.* The district court granted summary judgment to the defendants because Latner failed to establish that the defendants' reason for not rehiring him-that he was not as good at sales as the other persons-was pretext. We affirm.

Latner began working for Delta in 1994. His duties included finding new customers for Delta's products and providing technical support to Delta's current customers. He reported to Delta vice-president Alex Otte. Although Latner landed a major new customer for Delta in 1998, he contends that at about this time Otte began repeatedly calling him "old fart," "old man," and suggesting that he retire. The defendants deny that Otte made those remarks.

The market for Delta's coatings and resins began dropping in 2000. In order to cut costs, Delta started talking to one of its main competitors-Borden Chemical about consolidating the companies' coatings and resins lines. The companies eventually formed HA-International to sell the coatings and resins. As a result of the consolidation, Delta terminated its entire sales force, all of whom HA-International rehired except for Latner. HA-International contends that it did not hire Latner based in part upon the recommendation of vice-president Richard Smith, who while president of Delta observed that Latner was "not aggressive enough for sales."

Latner then sued. He named both Delta and HA-International as defendants, and he made allegations only against Delta, claiming that it "violated the ADEA when it terminated the plaintiff from his sales position." He alleged nothing about HA-International's failure to rehire him. However, when the parties filed a joint Case Management Plan under Federal Rules of Civil Procedure 16 and local

rule 16.1, Latner added a failure-to-hire claim against HA-International.

The defendants moved for judgment on the pleadings and for summary judgment. They argued that HA-International was entitled to judgment on the pleadings because none of the allegations in Latner's complaint was directed against it. They also argued that even if HA-International was not entitled to judgment on the pleadings, summary judgment was nonetheless appropriate because Latner could not establish that similarly situated employees were treated better than him(given that they were also terminated), and because Latner could not show that the reason he was not hired by the joint venture was pretextual.

The district court granted summary judgment to Delta and HA-International. In doing so, the district court did not separately analyze the wrongful termination claim against Delta and the failure-to-rehire claim against HA-International. Instead, the court analyzed Latner's claims as a single termination/failure-to-hire claim against a single defendant. The court then determined that although Latner had established a *prima facie* case of discrimination, he had not shown that HA-International's reason for not rehiring him was pretext.

The district court erred when it treated Latner's claims against Delta and HA-International as directed against a single defendant. There are limited circumstances under which affiliated corporations may be treated as a single defendant, such as when the affiliates ignore corporate formalities or when one directs the other to discriminate. *Papa v. Katy Indus., Inc.*, 166 F.3d 937,940-41 (7th Cir. 1999). Latner presented no evidence that any of these limited circumstances existed, nor have we found any in the record. The district court therefore should have analyzed Latner's claims against each defendant separately.

Latner cannot establish a *prima facie* case against Delta because he cannot show that it treated similarly situated younger employees more favorably. *See Koski v. Standex Int'l Corp.*, 307 F.3d 672, 676 (7th Cir. 2002).

Latner identifies all of Delta's other former salespersons as similarly situated employees who were treated more favorably, but it is undisputed that they were all terminated along with Latner. Therefore, summary judgment in Delta's favor on this claim was appropriately granted, though for a reason other than the one relied upon by the district court. *Wilhelm v. County of Milwaukee,* 325 F.3d 843, 846 (7th Cir. 2003).

As for Latner's claim against HA-International, he argues that he established pretext with evidence that he was a good salesperson. But the issue of pretext is relevant only if Latner first establishes a *prima facie* case against HA-International, and Latner makes no attempt to do so in is brief. *See Mills v.Health Care Servs. Corp.,* 171 F. 3d 450, 454 (7th Cir. 1999); *Coco v. Elmwood Care, Inc.,* 128 F. 3d 1177, 1179-80 (7th Cir. 1997). Even if we assumed that Latner could establish a *prima facie* case, he cannot establish pretext. To establish pretext, an employee must show that his employer did not honestly believe the reason it gave for not hiring him. *Franzoni v. Hartmarx Corp.,* 300 F.3d 767, 772 (7th Cir. 2002). Latner attempted to challenge HA-International's explanation for not hiring him through his own affidavit, in which he stated that vice president Smith never saw him interact with customers and therefore, lacked any basis to assess his skills. But Latner's affidavit states only that Smith never joined him during "technical sales calls." It does not contradict Smith's claims that he could assess Latner's skills by observing him during other types of sales meetings and situations.

Latner also suggests that pretext is apparent in the alleged ageist remarks by Otte, his supervisor at Delta. But Latner has offered no evidence that Otte was involved in HA-International's hiring decisions or that these decisions in any way stemmed from the objectionable remarks attributable to him. *Crabtree v. Nat'l Steel Corp.,* 261 F.3d 715, 723 (7th Cir. 2001); *Schreiner v. Caterpillar, Inc.,* 250 F.3d 1096, 1099 (7th Cir. 2001).

The remaining evidence Latner offered on the issue of pretext-affidavits from former customers attesting to his proficient knowledge of resins and coatings, and the deposition testimony of supervisors detailing his procurement of a major new account-established only that he was a good employee, not that HA-International did not honestly believe that Latner was not as good as the other salespersons it hired. *Franzoni,* 300 F. 3d at 772. For the preceding reasons, we AFFIRM the judgment of the district court.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

CALVIN G. LATNER,	)	
Plaintiff,	)	
v.	)	Cause No.IP01-993-C
	)	
DELTA-HA,INC., AND	)	
HA-INTERNATIONAL, LLC,	)	
(Sic)		

ENTRY ON DEFENDANTS' SUMMARY JUDGEMENT MOTIONS

Plaintiff Calving G. Latner has sued his former employer for age discrimination in violation of the Age Discrimination in Employment Act of 1967("ADEA"). 29 U.S.C. s. 621 *et seq.*. Latner worked for Delta-HA, Inc., and its predecessors in various capacities over a period of about seven years, working most recently as a regional sales, manager. In April 2001, Delta-HA merged with another company to form HA-International, LLC. ("HAI"). During the merger, Delta-HA terminated Latner's employment and HAI did not rehire him. Latner contends that this adverse action was the result of age discrimination. Defendant

Delta-HA contends that it terminated Latner because it terminated all sales positions. Defendant HAI contends that it did not rehire Latner because he was less qualified for the sales position than another candidate.

Defendant HAI has moved for judgment on the pleadings or in the alternative for summary judgment. Defendant Delta-HA has moved for summary judgment. In addition, the defendants have moved to strike several affidavits submitted by plaintiff in opposition to the summary judgment motion.

As explained below, the court grants defendants' motion for summary judgment.[1] Though Latner has established a prima facie case of age discrimination, he has not produced evidence that would permit a reasonable jury to conclude that defendants' stated reasons for not rehiring Latner after the merger were pretexts for age discrimination. In addition, the court denies the defendants' motion to strike.

Summary Judgment Standard

The purpose of summary judgment is to "pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). However, summary judgment is not a substitute for a jury's determination about credibility. Under Rule 56c of the Federal Rules of Civil Procedure, the court should grant summary judgment if and only if there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. See Fed. R. Civ. P. 56c; *Jay v. Intermet Wagner, Inc.*, 233 F. 3d 1014, 1016 (7th Cir. 2000).

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[1] Pursuant to the Federal Rule of Civil Procedure 12c, the court will treat defendant HAI's motion for a judgment on the pleadings as one for summary judgment.

On a motion for summary judgment, the moving parties must first come forward and identify those portions of the pleadings, depositions, answers to interrogatories, and admissions file, together with affidavits, if any, that the parties believe demonstrate the absence of a genuine issue of material fact. Fed. R. Civ. P. 56c; *Celotex Corp. v. Catrett,* 477 U.s. 317, 323 (1986). Where the moving parties have met the threshold burden of supporting the motion, the opposing party must "set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56c.

In determining whether a genuine issue of material fact exists, the court must construe all facts in light most favorable to and draw all reasonable inferences in favor of the non-moving party. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242,255(1986); *Haefling v. United Parcel Serv., Inc.,* 169 F. 3d 494, 497 (7th Cir. 1999). The existence of"some alleged factual dispute between the parties," or "some metaphysical doubt," however, does not create a genuine issue of fact. *Piscione v. Ernst & Young, L.L.P.,* 171 F. 3d 527, 532 (7th Cir. 1999). The proper inquiry is whether a rational trier of fact could reasonably find for the party opposing with respect to the particular issue. See, e.g., *Jordan v. Summers,* 205 F. 3d 337, 342 (7th Cir. 2000).

Although intent and credibility are often critical issues in employment discrimination cases, there is no special version of Rule 56 that applies only to them. See e.g. *Alexander v. Wisconsin Dep't of Health and Family Serv.,* 263 F.3d 673, 681 (7th Cir. 2001); *Wallace v. SCM Pneumatics, Inc., 103 F.3d1394, 1396 (7th Cir. 1997).* In an employment discrimination case, as in any case, the court must carefully view the evidence in the record in the light reasonably most favorable to the non-moving party and determine whether there is a genuine issue of material fact. See *Haugerud v. Amery School Dist.,* 259 F.3d 678, 689 (7th Cir. 2001)(same standard applies to any type of case).

Motion to Strike

Defendants have filed a motion to strike the declarations of Steve Baker, Tim Wade, Larry E. Critzer, and Thomas K. Smith pursuant to Federal Rule of Civil Procedure 37c(1). Under Rule 37c(1), a party who fails to amend a prior response to discovery as required by 26(e) without substantial justification is not "permitted to use as evidence at a trial, at a hearing, or on a motion, any witness or information not so disclosed," unless such failure is harmless.

The court denies the motion to strike. In responding to a motion for summary judgment, a party is not limited to obtaining evidence from only those witnesses previously identified in discovery. Even after the close of formal discovery, a party is not limited to obtaining evidence from only those witnesses previously identified in discovery. Even after the close of formal discovery, a party may keep digging informally for additional evidence, and especially for rebuttal and impeachment evidence. In this case, the affidavits in question were offered, at least in substantial part, in an attempt to rebut and impeach testimony from defendants' witnesses. And if there were to be a trial in this case, prejudice to the defendants could be avoided by giving them an opportunity to take depositions of the new witnesses.

Disputed Facts

For purposes of defendants' summary judgment motions, the following facts are either undisputed or reflect the record in the light reasonably most favorable to Latner, the non-moving party.

Prior to his termination, Calvin Latner worked for Delta-HA and its predecessor, Delta Resins and Refractories, Inc., for about seven years. Delta-HA is engaged in the foundry business and produces the resins

and refractory coatings used in casting molten metal. Latner joined the company in May 1994 as a coatings technical service representative. He assisted territory and customer service salesmen with on-site casting problems. Latner was then promoted to regional sales manager of Central Indiana in 1997. In this capacity, Latner worked both to convert foundries from using competitor's products to using Delta-HA products and to maintain Delta-HA's current customers. Performing these responsibilities requires technical expertise because actual sales are determined by foundry production. Pl. Res. At 4.[2] The sales manager must monitor the customer's production to ensure that the cast line runs efficiently, with minimal clean-up and acceptable scrap. Id.at 5.

Latner was initially supervised by John Alex Otte,Jr. who reported to Rick Smith, then Delta-HA's vice-president of sales. Latner testified that Otte made derogatory comments to Latner "all the time," calling Latner "old fart" and "old man." Latner Dep. At 53. Latner also testified that on one occasion, Otte remarked, "Well, why don't you go ahead and retire? And then I can have your job. You've got the best job in the whole industry." In May 2000, Gary Strehl became Latner's supervisor.

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[2] Plaintiff's brief in opposition to summary judgment, entitled "Plaintiff's Pretext Response to Summary Judgment," includes a jurat in which plaintiff Latner affirmed under penalty of perjury that "all statements that I made in Plaintiff's Pretext Response to Summary Judgment are true and (are) based upon my personal knowledge." The court assumes that the statements in question are those followed by the letters "SS." The result is a confusing document that shifts between the first and third person, so that Latner's testimony takes the form of various assertions sprinkled through a larger document. This confusing presentation also leaves room for Latner, if he were questioned about it later, to deny one or more of those assertions. Although this presentation is not recommended, the court has nevertheless considered those statements in his brief followed by "SS" as testimony from Latner.)

During the time Latner worked as a sales manager, he helped Delta-HA secure the coatings and resins business of Navistar, a large manufacturer of engines and engine blocks in Latner's assigned sales territory. Navistar was one of the largest foundries located in Latner's territory, and it quickly became one of Delta-HA's top three customers.

Despite winning the Navistar account, Delta-HA began experiencing a decline in business in late 2000. As a result, Rick Smith considered a potential reduction in force and also began discussions with Borden Chemical concerning a joint venture. Smith wrote a memorandum, dated February 5, 2001, that detailed the proposed staff reductions and included the following description:

> Cal Latner(age 59) Sales. Cal calls on Central Indiana (i.e.) Navistar, Grede New Castle, Golden Foundry, etc.). Cal worked for Borden prior to coming to Delta-HA as a coatings expert. He worked for Bill Adamson, however, this did not work out so we moved him into Sales approximately 3 years ago. He does a good maintenance job, but not aggressive enough for sales. With company approximately 6 years.

Pl. Ex. 3. Two months later Delta-HA and Borden joined forces to form HAI, a company that would manufacture three-product line: resins, refractory coatings, and resin-coated sand. Both companies reduced their respective workforces to accommodate the joint venture. Smith testified that Delta-HA eliminated all positions in sales, technical service, and in research and development. Smith Dep. At58-59. Latner received a letter from Smith terminating his employment with Delta-HA and offering him a severance package. Pl. Ex.4 (letter dated March 29, 2001). At the time of his termination, Latner was 59 years old.

Smith now vice-president of HAI, and Keith McLean, president and CEO of HAI began selecting employees for the new company. They filled HAI's vacancies by selecting individuals from a pool of employees terminated by Borden

and Delta-HA. McLean Dep. At 7-8. Smith and McLean considered two individuals from Delta-HA for HAI's Central Indiana sales territory: Robert Stransky, age 42, and plaintiff Calvin Latner, age 59. Smith Dep. At 24-25. Because Smith knew both men, he ultimately decided who would be hired. *Id.* At 57; McLean Dep. At 18-19. Smith testified that he chose Stransky because, based on his first-hand knowledge working with both men, he felt that Stransky "had the better strengths in sales and product knowledge to do the job we wanted to do in the new company." Smith Dep. At 57. Smith further testified that neither Otte nor Strehl had any input into the decision to hire Stransky over Latner. Id.

Other facts are noted below in the court's discussion of the issues, keeping in mind the standard for considering evidence on a motion for summary judgment.

Discussion

The ADEA protects individuals 40 years of age and over from age-based discrimination, making it "unlawful for an employer...to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. s. 623(a)(1). Because Latner does not contend he has any direct evidence of age discrimination linked to his termination by Delta-HA or to HAI's decision not to rehire him, the court analyzes his claim under the three-step pattern of indirect proof established in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802 (1973). See *Gordon v. United Airlines, Inc.,* 246 F.3d 878, 885 (7th Cir. 2001); *Wade v. Lerner New York, Inc.,* 243 F. 3d 319, 322 (7th Cir. 2001)(applying the *McDonnell Douglas* framework to ADEA case where plaintiff presented no direct evidence of age discrimination); see also *Reeves v.Sanderson Plumbing Prod., Inc.,* 530 U.S. 133, 142 (2000)(assuming that the *McDonnell Douglas* framework applied to an ADEA claim and recognizing that the federal circuits have employed in

ADEA cases given their sensitive and difficult nature and lack of eyewitnesses).

Under this method of proof, Latner must first establish a prima facie case of age discrimination by producing evidence tending to show that: (1) he belongs to the protected class(age 40 or over); (2) he was performing his job satisfactorily; (3) he suffered an adverse employment action; and (4) defendants treated similarly situated but substantially younger employees more favorably than Latner. See *Gordon,* 246 F.3d at 886; see also *O'Connor v. Consolidated Coin Caterers Corp.,* 517 U.S. 312-13 (1996) (recognizing that the *prima facie* case requires evidence adequate to create an inference that an employment decision was based on an illegal discriminatory criterion; plaintiff must show discrimination in relation to a substantially younger employee and not someone outside the protected class to raise an inference of discrimination).

I. *Prima Facie Case*

In support of summary judgment, defendants contend that Latner cannot establish a prima facie case because no similarly situated younger employee was treated more favorably than Latner. Defendants argue that because Delta-HA terminated all of its sales employees when it formed a joint venture with Borden Chemical, they were not treated any better than Latner. Similarly, defendants argue that because HAI never employed plaintiff, there is no similarly situated, younger employee who was treated better than Latner.

This argument invites the court to ignore reality. The argument treats the decision to terminate Latner and the decision not to rehire him for the new joint venture as if they bore no connection to each other. The court does not agree. Evidence indicates that the decisions to terminate Latner's employment and not to rehire were related decisions made in the context of a joint venture by a

decision-maker common to both entities. MeLean testified that Latner's termination "was concurrent with the creation of the merger" and that the decision to hire Stransky over Latner was made before the creation of HAI, sometime in February or March 2001. McLean Dep. At 6-7. Moreover, Smith ultimately made both decisions. As president and CEO of Delta-HA, Smith terminated Latner's employment, and as vice-president of HAI, Smith decided to hire Stransky over Latner. Pl. Ex. 4 (letter dated March 29, 2001); McLean Dep. at 18-19.

As a result of the creation of the joint venture, Stransky was a similarly situated younger employee who was treated better than Latner. HAI hired 42 year old Stransky over 59 year old Latner. The fact that, at age 42, Stransky himself is in the class protected by the ADEA is immaterial. It is enough that he is substantially younger than Latner. *Miller v. Borden, Inc.*,168 F.3d 308, 313 (7th Cir. 1999) ("The younger employees 'need not be outside the protected class, i.e. under the age of forty'...but should be substantially – i.e., at least ten years – younger than the terminated employee."), quoting *Hartley v. Wisconsin Bell, Inc.*, 124 F.3d 887, 892-893 (7th Cir. 1997).

For purposes of summary judgment, Latner has established the remaining elements of a prima facie case. Latner is in the protected by the ADEA, and suffered an adverse employment action. In addition, Latner has come forward with evidence that he was performing his job satisfactorily. In January 2001, Latner's supervisor rated his overall performance as "successful." Pl. Ex. 2.

Furthermore, in the section of the evaluation form marked "Where Accomplishments/ Performance Fell Short/Improvement Needed," the supervisor wrote no comments and entered only a question mark. *Id.* Smith's own memorandum concerning staff reductions states that Latner "does a good maintenance job." Pl. Ex. 3. Finally, the evidence when construed in a light most favorable to Latner suggest that he played a vital role in Delta-HA's acquisition of Navistar's business.

II. Pretext

The prima facie case is intended to identify circumstances in which a jury could infer that an employment decision, if not explained, was the product of illegal discrimination. See, e.g. *Gordon,* 246 F.3d at 886. However, if the employer can then merely articulate a legitimate, non-discriminatory reason for its decisions, that step shifts the burden back to the plaintiff to show that the employer's stated reason is a pretext, that is, a false explanation for the decision. See *id.*

Latner's age discrimination claim fails because he has produced no evidence that would allow a reasonable jury to find that defendants' reasons for terminating his employment and hiring Stransky over him were pretexts for discrimination. A pretext "means more than an unusual act; it means something worse than a business error; 'pretext' means deceit used to cover one's track's." *Kulumani v.Blue Cross Blue Shield Ass'n,* 224 F. 3d 681, 684 (7th Cir. 2000), citing *Reeves,* 530 U. S. at 146-48. A plaintiff can establish pretext if he can show that the defendant's proffered reasons for the challenged employment action were either lies or completely lacking in factual basis. See, e.g., *Mills v. Health Care Serv. Corp.,* 171 F. 3d 450, 458-59 (7th Cir. 1999) (plaintiff can establish pretext by demonstrating that an "employer's evaluation was so egregiously mistaken that it had no basis in fact"); *Ghosh v. Indiana Dep't of Environmenttal Mgmt.,* 192 F.3d 1087, 1091 (7th Cir. 1999).

Latner is not required to present direct evidence of pretext. He can raise an issue of pretext by producing evidence that the proffered reasons of Delta-HA and HAI for their decisions are not credible;

> a plaintiff may accomplish this showing [of pretext] with evidence tending to prove that the employer's proffered reasons are factually baseless, were not the actual motivation for the discharge in question, or were insufficient

> to motivate the discharge.... These formulations are simply different ways of recognizing that when the sincerity of an employer's asserted reasons for discharging an employee is cast into doubt, a fact finder may reasonably infer that unlawful discrimination was the true motivation.

Testerman v. EDS Technical Prod. Corp., 98 F. 3d 297, 303 (7th Cir. 1996) (citation omitted), cited in *Adreani v. First Colonial Bankshares Corp.*, 154 F. 3d 389, 395 (7th Cir. 1998); see also *Gordon*, 246 F. 3d at 888-89. To avoid summary judgment, Latner need not prove pretext; it would sufficient if he came ~~for~~ward with evidence that would allow a reasonable jury to find that the offered reasons for terminating his employment and hiring Stransky over him were false.

If defendants honestly believed their reasons for taking these actions, pretext would be absent. This is true even if the reasons were foolish, trivial, or mistaken. See *Gordon*, 246 F. 3d at 889; *Wade v. Lerner New York, Inc.*, 243 F.3d 319, 323 (7th Cir. 2001) (if employer honestly believed in the nondiscriminatory reason it offered, it is irrelevant whether the employer disciplined the employee for an infraction she did not commit); see also *Pitasi v. Gartner Group, Inc.*, 184 F. 3d 709, 718 (7th Cir. 1999) ("it is not sufficient for the employee to show his employer fired him for incorrect or poorly considered reasons"). As the Seventh Circuit has often said, the courts do not function as a "super-personnel department" in reviewing employment decisions. See e.g., *Gordon*, 246 F. 3d 889; *Rummery v. Illinois Bell Tel. Co.*, 250 F. 3d 553, 557 (7th Cir. 2001)(the court deals with "small gradations, with an employer's subjective comparison of one employee to another, and it is incumbent upon us to remember that what is at issue is not the wisdom of an employer's decision, but the genuiness of the employer's motives"), quoting *Testerman*, 98 F.3d at 304; *Malacara v. City of Madison*, 224 F.3d 727, 731 (7th

Cir. 2000)(employer may take negative employment actions "for a good reason, a bad reason, a reason based on erroneous facts, or for no reason at all, as long as its action is not for a discriminatory reason"), quoting *Bruno v. City of Crown Point,* 950 F.2d 355, 364 (7th Cir. 1991).

The defendants contend that Latner was terminated and not rehired because Stransky possessed more overall "product knowledge" in relation to HAI's goals and because Stransky was a better salesman than Latner. Def.Mem., at 18. "Product knowledge" refers to the fact that HAI manufactures three lines of products: resin-coated sand, coatings, and resins. Smith testified that in his opinion, Stransky was strong in two areas(resins and coatings) while Latner was strong in only one (coatings). Smith Dep. at 25.

Latner has the burden of producing evidence that tends to show the defendants did not believe Stransky possessed more product knowledge or was a better salesman. Latner argues he has met his burden on pretext in several ways. First, Latner asserts that McLean lied about the decision-making process. Second, Latner contends that the comments made by Otte demonstrate that the defendants' decisions were made on the basis of age. Third, Latner argues that there was no factual basis for the reasons Smith gave for choosing Stransky over Latner. In the court's view, however, the cited evidence would not support a reasonable inference of pretext.

A. McLean's Testimony

In defendants' answers to plaintiff's interrogatories, defendants stated that "it was the opinion of Rick Smith and Keith McLean that Plaintiff was not as qualified..." and that "Rick Smith and Keith McLean made the decision." Def. Ans. To Interrog. No.4. In his deposition McLean made statements such as: "I don't really know Cal," "I had no real input into the decision between Bob Stransky and Cal Latner," and "Rick was in a much better position to make an assessment relatively between the two than I." McLean Dep.

at 17-19. Latner contends that McLean's testimony contradicts the interrogatory response and therefore raises a fact question about the honesty of defendants' explanation for selecting Stransky.

The court sees no material inconsistency. McLean's deposition testimony indicates that he and Smith conducted the selection process together and discussed that individual candidates. *Id.* The decision between Stransky and Latner came down to what capabilities they thought the candidates possessed. Lacking knowledge of the skill level of the candidates, McLean relied on Smith's assessment. Thus, the decision to hire Stransky was a joint one, though in choosing Stransky, McLean relied on Smith's knowledge of the two men. The different emphases in the interrogatory answers and the more detailed deposition testimony would not support a reasonable inference of pretext.

B. Otte's Comments

Latner testified that his supervisor, John Alex Otte, Jr. made derogatory age-related comments to him. Latner testified that Otte frequently called him "old man" and "old fart," and on one occasion remarked "Well, why don't you go ahead and retire" And then I can have your job. You've got the best job in the whole industry." Latner Dep. at 53. Latner argues that these comments are evidence that defendants' decisions regarding him were related to his age.

Though these comments may evidence bigotry on the part of Otte, bigotry alone is not actionable. See *Gorence v. Eagle Food Cent., Inc.*,242 F.3d 759, 762 (7th Cir. 2001) (bigotry "is actionable only if it results in injury to a plaintiff; there must be a real link between the bigotry and an adverse employment action"), quoting *Miller v. American Family Mut. Ins. Co.*, 203 F. 3d 997 (7th Cir. 2000). The comments must be made by someone involved in the decision-making process at or near the time of the adverse action and in reference to the adverse action taken. *Id.* While the comments Latner described were made by his

supervisor, the evidence indicates that neither Otte not Strehl had any input into the decisions to terminate and not rehire Latner. Otte Dep. at 43; Smith Dep. at 57; McLean Dep. at 14. Consequently, Otte's comments do not support a reasonable inference of pretext.[3]

C. Smith's Rationale

In explaining the defendants' decisions, Smith has testified that he chose Stransky over Latner because Stransky possessed product knowledge consistent with HAI's goals and product lines. Smith Dep. at 25. Smith also testified that he based the decision on his personal knowledge of both Latner and Stransky, and on his belief that Delta-HA's technology, not Latner, was responsible for acquiring Navistar's business. *Id.* At 9, 25. Smith also believed that Latner was not "aggressive enough for sales." Pl.Ex. 3.

Latner argues that Smith's rationale is "dissembled" and lacks factual basis. First, Latner offers evidence that he possessed product knowledge consistent with HAI's goals, or as consistent as Stransky's product knowledge. Latner argues that business has declined in both resins and coatings, not just coatings, and that he made significant sales of coatings sixty days before his termination. Second, Latner contends that Smith did not have personal knowledge of his sales skills, asserting that Smith never personally observed him on a sales call. Steve Baker Aff.;

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[3] The Seventh Circuit has stated that "evidence of inappropriate remarks not shown to be directly related to the employment decision...in connection with other evidence, might support a case under *McDonnell Douglas.*" *Gorence v. Eagle Food Cent. Inc.*, 242 F.3d 759, 762 (7th Cir. 2001). In this case, however, the court finds no other evidence supporting an inference of pretext, and there is simply no evidence linking Otte's alleged comments to the decision not to hire Latner for the new joint venture.

Larry E. Critzer Aff. The affidavits of executives from several of Delta-HA's customers state that Smith never personally observed Latner at their facilities. In addition, Latner claims he possessed the requisite sales skills and was responsible for procuring Navistar's business. The affidavits of executives from Navistar and Golden Castings state that Latner was instrumental in winning their business for Delta-HA. Latner presents further evidence that he was unable to obtain some accounts in his territory due to reasons beyond his control. *Id.;* Smith Dep. at 20-21; Stransky Dep. at 21. (explaining that Latner was unable to obtain the Chrysler account because a competitor offered an incentive package that Delta-HA could not match).

A stated reason for a termination decision is not factually baseless, however, simply because it might be partly wrong as a factual matter. The relevant pretext inquiry is whether the decision-maker honestly believed the asserted facts underlying the termination decision. E.g. *Wade,* 243 F.3d at 323 (where store manager made decision to discipline employee based on supervisor's report that plaintiff arrived late, the relevant inquiry was whether the decision-maker honestly believed that the plaintiff was late; plaintiff's assertion that she arrived on time did not create a disputed fact question material to pretext); *Baron v. Highland Park,* 195 F.3d 333, 341 (7th Cir. 1999) ("the overall correctness or desirability of the reasons proffered is not relevant to the determination of pretext"); *Billups v. Methodist Hosp. Of Chicago,* 922 F.2d 1300, 1304 (7th Cir. 1991)(court's responsibility is not to determine whether alleged acts occurred, but whether the employer's belief was honestly held); *Pollard v. Rea Magnet Wire Co.,* 824 F.2d 557, 559-560(7th Cir. 1987) (where an employer has honestly described the motivation behind its decision, that decision is not pretext for discrimination just because the plaintiff asserts the defendant's beliefs were inaccurate).

The above evidence offered by plaintiff tends to prove only that the[sic] might have made a poor decision rather then a dishonest one. Latner has not identified any

evidence that would support a reasonable a reasonable[sic] inference that Smith did not honestly believe that Stransky was a better candidate than Latner. Without such evidence, Latner cannot raise a fact issue on pretext with respect to Smith's reasons for his termination. *Rummery v. Illinois Bell Tel. Co.*, 250 F.3d 553, 557 (7th Cir. 2001) ("even an employer's erroneous decision making, exhibiting poor judgment, is not sufficient to establish pretext."), quoting *Abioye v. Sundstrand Corp.*, 164 F. 3d 364, 368 (7th Cir. 1996).

In an effort to find a genuine issue of fact, Latner argues that Smith's testimony about his basis for knowledge of Latner's and Stransky' sales abilities is false. The effort is not successful. Smith testified that he had personal knowledge of Stransky's abilities from their work together years earlier at Ashland. Smith Dep. at 25. Although Smith did not directly supervise Stransky, both men testified that he did supervise Stransky indirectly and met with him often. See Stransky Aff. Par.2; Smith Dep. 23-24.

Latner also disputes Smith's testimony about whether Smith observed Latner on sales calls. After reviewing the evidence, it is clear that Latner's attempt to create a dispute here is based on a restrictive definition of a "technical sales or service call," as opposed to a flat denial that Smith ever spent time with Latner and prospective or current customers. Also, the evidence is undisputed that Smith had indirect supervisory responsibility over Latner and his sales efforts. There is no *genuine* issue of material fact here that would defeat summary judgment.

In summary, then, plaintiff's evidence does not create a genuine issue of material fact regarding pretext because it does not create a reasonable inference that the reasons given by defendant's for their decisions were false. Therefore, plaintiff's claim cannot survive summary judgment.

Conclusion

For the reasons stated above, the court grants summary judgment to defendants Delta-HA and HAI, and denies defendants' motion to strike. Final judgment for defendants will be entered.